In the High Court of Uttaranchal, at Nainital

First Appeal No. 749/2001
(Old No. 619/1987)

1- State of U.P. through the Collector, Uttarkashi.
2- Executive Engineer, P.W.D., Provincial Division,
Bhatwari, Uttarkashi … Defendant-Appellants.

Versus

1- Ram Singh S/o Dalip Singh,
2- Deep Chandra Singh S/o Jeet Singh
R/o Bus Stand, Bhatwari Road,
Uttarkashi … Plaintiffs –Respondents.

Sri R.C. Arua, learned Standing Counsel for the appellants.
Sri R.Dobhal, learned counsel for the respondents.

Hon'ble B.C. Kandpal, J.

The First Appeal, has been preferred by the State and another against the judgment and decree dated 4-4-1987, passed by the District Judge, Uttarakashi, in O.S. No. 13/1985 Ram Singh and another Versus State of U.P. and another.

2- Brief facts of the case are that the plaintiff/respondent filed a suit for permanent injunction, restraining the defendants/State and another from realizing Rs. 36,364=00 as penalty from the plaintiffs/respondents, with the allegation that the plaintiffs/respondents could not start the construction of 93 M. span bridge for want of design. The design of the bridge was to be supplied by the defendants/appellants after getting it approved from the office of Chief Engineer, P.W.D. U.P. Lucknow. The agreement was executed on 3-2-1981 by the plaintiffs/respondents on the assurance given by the officers of the defendants/appellants that the design of the bridge shall be given to them soon. The plaintiffs/respondents purchased iron fro the construction of the bridge but they were told that it was not tested iron. The plaintiffs/respondents however requested the defendants/appellants to dispute some officer to help in purchasing tested-iron but the

defendants/appellants did not yield to it. The plaintiffs/respondents also repeatedly requested the defendants to supply approved design for the construction of 93 M. Lata Span Bridge but the defendants failed to supply the same. Accordingly to the terms of agreement the anchor galleries were also to be supplied by the defendants/appellants before starting the construction of the bridge because without it, construction work could not be started. Similarly wind anchor, seddles and iron ropes were also to be supplied by the defendants but the defendants/appellants failed to supply these articles. The defendants/appellants were to provide approach road to reach the place, where the bridge was to be constructed, but the same was not provided by the defendants. So the plaintiffs/respondents could not start the work in time. The defendants/appellants cancelled the contract of the plaintiffs/respondents and asked him to pay the penalty, because the bridge was constructed by another contractor at higher cost. Hence, the suit has been filed for the reliefs mentioned above.

3- The defendant/appellant contested the suit inter alias on the ground that after acceptance of the tender the plaintiffs signed the agreement on 23-2-1981. The plaintiffs/respondents signed the agreement on receiving map of the suspension bridge. According to the terms of the agreement and plaintiffs/respondents were to arrange for tested iron and thereafter they should start the work. It was also the duty of the plaintiffs/respondents to complete fabrication work of the implements. According to the terms of the agreement the construction work of the suspension bridge was to be started on 23.2.1981. The plaintiffs/respondents did not procure the tested steel till 23-2-1981. The defendants/appellants insisted by writing letters to the plaintiffs/respondents to procure steel and start the work. After passing of three months from the date of execution of the agreement, the plaintiffs/respondents did not start the work, so the defendants cancelled the contract on 2-6-1981. The defendants/appellants engaged another contractor for construction of Lata suspension bridge and had to pay him Rs. 70,682=33P. in addition to the amount which was to be paid to the plaintiffs for the

construction of the bridge. The defendants/appellants are entitled to impose penalty to recover the difference of amount, which was paid in addition to the amount payable to the plaintiffs/respondents.

4. On the pleadings of the parties, the following issued were framed:-

1- Was the contract for the construction of Lata span Bridge given to the plaintiffs and the work was to be completed till 22-2-1982?.

2- Whether the contract was cancelled by the defendants in June, 1981, illegally?.

3- Whether the bridge was got constructed through another contractor as alleged in paras-51 and 52 of the W.S.?. If so, are the defendants entitled to realize penalty from the plaintiffs?.

4- To what relief, if any, are the plaintiffs entitled?.

5- Both the parties adduced their evidence in support of their case. The trial court thereafter having perused the entire material available on the record and hearing the learned counsel for the parties, decreed the suit for permanent injunction. The trial court vide judgment and order dated 4-4-87 restrained the defendants-appellants from realizing Rs. 36,364/- by way of penalty from the plaintiffs/respondents.

6- Feeling aggrieved by the aforesaid judgment and decree, the State an another has preferred this appeal before the Allahabad High Court, which has been transferred to this court for disposal, after creation of new State.

7- Heard learned counsel for the parties and perused the record.

8- The following point arise in this appeal for consideration:-

> "Whether the contract given to the plaintiffs/respondents for construction of Lata Span Bridge was cancelled by the

defendants/appellants in June, 1981, illegally and as to whether the bridge was got constructed through another contractor?. If so, are the defendants/appellants entitled to realize the penalty from the plaintiffs/respondents?.

9- The record shows that there was an agreement between the parties for construction of Lata Span Bridge, which took place on 23-2-1981 and the work was to be completed within a period of one year.

10- According to the terms and conditions of the contract the defendants / appellants were to provide the anchor galleries, wind anchors, seedless and iron-ropes etc. before the start of the work. The approach road was also to be provided by the defendant/appellants from reaching to the place where the bridge was to be constructed. The witness produced by the plaintiffs/respondents is Ram Singh P.W.1, whose deposition shows that he has denied the supply of the design-map of bridge in question. This witness has also deposed that the design-map of the bring was not given to him at the time of the execution of the agreement. Therefore, only for want of design-map of the bridge the construction was held-up.

11- The record further shows that the design of all the items like anchor galleries, wind anchors, seddles and iron ropes were also not supplied to the plaintiffs/respondents upto 5th of May 1981 and the plaintiffs/respondents wrote the letters to the Executive Engineer of the Department on 11-5-1981, which is available on record as paper, Ext. 10, asking for design of anchor galleries, wind anchors, etc. but even after writing letter, the design was not given to the plaintiffs/respondents with the result the plaintiffs/respondents could not start the construction work.

12- The record further shows that the seddles to be fitted on the tower, could not be fitted upto 23-7-1982, as the paper No. 64-C shows that the iron ropes and the seddles were received in the

office of the defendants/appellants in the months of July, 1982 while the agreement of the plaintiffs/respondents was cancelled on 2-6-1981, which is earlier to the date of receiving the seddles by the defendants/appellants. Therefore, it is abundantly clear that the agreement of the plaintiff/respondents was cancelled before the supply of the material for construction of the bridge. It is very difficult to aceept that in case if the material was not supplied to the plaintiffs/respondents, then how the construction work of the bridge could be in progress. The defendant/appellants have, therefore, failed to perform their part of agreement by not supplying the material to start the construction work and the plaintiffs/respondents are not a fault, hence no penalty could be imposed against them.

13- The evidence of the defendants/appellants, on the other hand shows that D.W.1 Suresh Chandra Aggarwal, an Assistant Engineer of the Department, who was also the incharge of the site, has admitted in his statement at para-4 that the department was to construct the approach road through another contractor and at the time when the agreement was executed between the parties, it was not in existence. So it is also clear from the statement of D.W.1, that without the construction of approach road, how the plaintiffs/respondents could reach the site where the work was to be carried. D.W.1, Suresh Chandra Aggarwal, has further stated that the anchor galleries were to be constructed by one Hari Singh contractor. This witness has shown his inability to state as to whether the anchor galleries were provided to the plaintiffs/respondents in order to start the work. As I have already observed above that without supplying the anchor galleries and the other material, how the work could be carried on by the plaintiffs/respondents hence they are not liable for any penalty on account of the fault of the defendants/appellant.

14. Further the design map of the approach road was also an integral part for starting the construction work of the bridge. P.W.1, Ram Singh has stated in his deposition that no map was supplied to

him with the agreement and he was assured that the map will be supplied to him after receiving the same from the office of the Chief Engineer. The letter date 5-2-1985, Ext.9 shows that the design map of the bridge was not available in the office of the Chief Engineer, Lucknow. This fact further finds strength on the basis of this evidence that the Superintending Engineer P.W.D. Uttarkashi wrote letter to the Chief Engineer, Lucknow on 5.5.1981 which is available on the record as Ext. 7, stating therein that the design-map of the bridge in question was not received. Therefore, it is quite clear that the design-map of the bridge was also not received by the plaintiffs/respondents and on account of the same they could not start the construction work.

15- In view of the aforesaid assessment of the evidence, I come to the conclusion that the trial court has rightly decreed the suit of the plaintiffs/respondents. I do not find any infirmity in the impugned judgment and decree passed by the trial court.

16- The appeal lacks merit and is liable to be dismissed.

17- Accordingly the appeal is dismissed. No order as to costs.

(B.C. Kandpal, J.)

Dated: 23-09-2006

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